Supreme Court, U.S.
FILED
MAY 26 2006
OFFICE OF THE CLERK

No. 05 1505

In The

Supreme Court of the United States

GLORIA ALLRED and ALLRED, MAROKO & GOLDBERG,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF CONTRA COSTA,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA, and DEFENDANT SCOTT EDGAR DYLESKI,

Real Parties in Interest.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

PETITION FOR WRIT OF CERTIORARI

ERWIN CHEMERINSKY
Counsel of Record
DUKE UNIVERSITY
SCHOOL OF LAW
Science Drive & Towerview Rd.
Durham, North Carolina 27708
(919) 613-7173

Attorneys for Petitioners

PAUL HOFFMAN
MICHAEL D. SEPLOW
SCHONBRUN DESIMONE
SEPLOW HARRIS &
HOFFMAN LLP
723 Ocean Front Walk
Venice, California 90201
(310) 396-0731

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether it violates the First Amendment for a trial court to issue an order in a criminal case preventing an attorney representing a non-party witness from making public statements about a pending case, including from discussing the conduct of government officials who violated her client's rights and from commenting on matters in the public domain.

CORPORATE DISCLOSURE STATEMENT

Allred, Maroko & Goldberg is a privately held professional corporation. None of its shares is held by a publicly traded company.

TABLE OF CONTENTS

	Page
Question Presented	i
Corporate Disclosure Statement	ii
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision Involved	1
Statement of the Case	2
Reasons for Granting the Writ	7
THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE, WHICH HAS DIVIDED THE FEDERAL AND STATE COURTS, CONCERNING WHETHER AND WHEN GAG ORDERS MAY BE IMPOSED ON ATTORNEYS PREVENTING THEIR SPEECH ABOUT PENDING CASES	7
Conclusion	19

TABLE OF AUTHORITIES

Page

CASES

Alexander v. United States, 509 U.S. 544 (1993) 8

In re Application of Dow Jones & Co., 842 F.2d 603 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988) 12, 13

Butterworth v. Smith, 494 U.S. 624 (1990) 18

Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968) 17

CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) 10

Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) 11, 12

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 9, 14, 19

Kemner v. Monsanto Co., 112 Ill.2d 223 (Ill. 1986) 12

Levine v. United States, 764 F.2d 590 (9th Cir. 1985) 11

Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994) 8

In re Morrissey, 168 F.3d 134 (4th Cir. 1999) 13

National Broadcasting Co. v. Cooperman, 116 A.D.2d 287 (N.Y. App. Div. 1986) 14

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) ... 8, 9, 17

Near v. Minnesota, 283 U.S. 697 (1931) 10

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 19

State v. Bassett, 128 Wash.2d 612 (1996) 14

Twohig v. Blackmer, 121 N.M. 746 (1996) 12

TABLE OF AUTHORITIES – Continued

Page

United States v. Brown, 218 F.3d 415 (5th Cir. 2000) 15

United States v. Carmichael, 326 F.Supp.2d 1267 (D.Ala. 2004) 10

United States v. Ford, 830 F.2d 596 (6th Cir. 1987) ...10, 11, 12

United States v. Scarfo, 263 F.3d 80 (3d Cir. 2001) 14

United States v. Tijerina, 412 F.2d 661 (10th Cir. 1969) 13, 14

MISCELLANEOUS

Sheryl A. Bjork, *Indirect Gag Orders and the Doctrine of Prior Restraint*, 44 U. Miami L. Rev. 165 (1989) 8

Douglas E. Mirrell, *Gag Orders and Attorney Disciplinary Rules: Why Not Base the Former Upon the Latter*, 17 Loy. L.A. Ent.L.J. 353 (1997) 7

OPINIONS BELOW

A copy of the unpublished order of the Court of Appeal of the State of California, First Appellate District, denying the writ of mandate/prohibition and the request for a stay, dated January 12, 2006, is included in the Appendix to this Petition for Certiorari at page 1 (hereafter "App."). A copy of the unpublished Protective Order of the Superior Court of the State of California, for the County of Contra Costa, dated November 21, 2005, is included at App. 2. A copy of the unpublished decision of the Superior Court of the State of California, for the County of Contra Costa, dated November 21, 2005, is included at App. 3. A copy of the unpublished order of the Supreme Court of California denying review, dated March 15, 2006, is included at App. 5.

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. §1257, this Court has jurisdiction to review the decision of the California Court of Appeal of the State of California, denying a writ of mandate/prohibition and a stay, following the denial of discretionary review by the Supreme Court of California on March 15, 2006.

CONSTITUTIONAL PROVISION INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition

the Governmer r redress of grievances." U.S. Const., amend. I.

STATEMENT OF THE CASE

This case raises the profoundly important question of when courts may place gag orders on lawyers, preventing them from speaking to the press about pending cases and even from commenting on the wrong-doing of government officials and matters of public concern. Specifically, the issue before this Court concerns the constitutionality of a prior restraint imposed on an attorney representing a potential witness, keeping the lawyer from speaking to the press or the public about the case and the conduct of the police and prosecutors handling it. The trial court imposed this order without any findings that the speech posed a clear and present danger or a substantial likelihood, or even a reasonable likelihood, of materially prejudicing the adjudicatory proceedings.

The trial court's gag order was issued in the case of *People v. Dyleski*, No. 3-219113-8, now pending in the Superior Court of the State of California, for the County of Contra Costa. On October 15, 2005, Pamela Vitale, the wife of a prominent criminal defense attorney, was killed. On October 21, 2005, the District Attorney for Contra Costa County filed a criminal complaint in Superior Court against Scott Edward Dyleski for the murder of Pamela Vitale.

In late October 2005, Gloria Allred and her firm were retained by a potential witness in the *Dyleski* case. Ms. Allred is a well known California attorney, both for the

many cases she has handled and for her regular appearances on television to offer commentary on various legal matters. On numerous occasions, Ms. Allred and her law firm have represented potential witnesses in criminal actions, including several high-profile homicide cases. For example, Ms. Allred represented Amber Frey, a witness in the widely publicized Scott Peterson murder trial.

On October 24, 2005, Ms. Allred contacted the District Attorney's office on behalf of her client, a minor, and informed Deputy District Attorney Richard Jewett that her client may be a potential witness in the case. Prior to Ms. Allred's call to the District Attorney, neither the police nor the prosecutor had contacted Ms. Allred's client. Ms. Allred and Mr. Jewett agreed to meet on October 27, 2005 to discuss her client's potential testimony.

To her surprise, however, the next morning, on October 25, 2005, Ms. Allred was informed that her client's residence was being searched by the police and that her client had been subpoenaed to appear to provide testimony for the criminal case before a grand jury later that day.[1]

Ms. Allred contacted Mr. Jewett and requested that the grand jury testimony be postponed to the following day to give her the opportunity to fly to Northern California so

[1] Petitioners contend that the government used abusive tactics with respect to their client and that the police engaged in excessive use of force when they searched the home, including pointing a gun at a family member who had done nothing wrong. [Ex. 21; RT at 26:16-24 (included as part of the Appendix filed with the California Court of Appeal in seeking the writ of prohibition and mandate and stay of the Protective Order)]. Petitioners' objection to the trial court's gag order, in part, is based on their apparently being prevented even from discussing this misconduct by the police.

that she could meet with her client and accompany her client, a minor, to the grand jury. Ms. Allred wished to be able to wait outside the grand jury and be available to confer with her client should her client so desire. The District Attorney refused Ms. Allred's request.

On or about October 26, 2005, counsel for the defendant moved for a "gag order" to restrict public statements about this action by the police and prosecution. The District Attorney promptly joined the defendant's motion and requested that the protective order apply to defense counsel and also to attorney Gloria Allred and her law firm who were representing a potential witness.

On the following day, October 27, 2005, the trial court heard arguments and issued a broad gag order. The court later issued an amended protective order that specifically included counsel for potential witnesses. Petitioners filed their request to modify or set aside the protective order on November 8, 2005. The San Francisco Chronicle also filed a motion to vacate the interim protective order.

On November 21, the trial court issued a revised Protective Order. App. at 3. The trial court also issued a "Decision Granting in Part and Denying in Part Motions for Protective Order." App. at 5. The Protective Order applies to "[t]he Office of the District Attorney, those investigating the case on behalf of the People, the Defendant, counsel for Defendant, those investigating the case on behalf of Defendant, Judicial Officers and Court Staff, Sworn Peace Officers and Public Officials, and those who have been advised that they might be material witnesses in the matter or who have appeared and testified at either a preliminary examination or a grand jury investigating

the matter, *and all agents, attorneys, or other representatives of such witnesses*, from making any out-of-court statement" concerning many different aspects of the case. App. at 3 (emphasis added).

Specifically, the gag order said that these individuals could not make out-of-court statements as to any of the following:

> "1. The nature, source, substance or effect of any purported evidence alleged to have been accumulated or to exist in regard to this matter.
>
> 2. The existence, or possible existence, of any document, exhibit or other physical evidence, the admissibility of which may have to be ruled on by the court.
>
> 3. Any opinion or public comments as to the weight, value or effect of any evidence as tending to establish either guilt or innocence.
>
> 4. The identification or possible existence of any other person that might be alleged to have committed or participated in the commission of the subject crime.
>
> 5. The identification of any potential witness to the crime, or his probable testimony."

App. at 4.

The Protective Order further provides that it does not restrict public statements regarding various matters, including "the result of any stage of the judicial proceeding held in open court." App. at 4.

The trial court issued a Decision accompanying its Protective Order. The trial court's opinion stated a number of "Findings." Specifically, the trial court's findings were:

> "1. This court finds that this matter has generated an extraordinary amount of pretrial publicity; an amount, in fact, very rarely seen in the murder of an individual. . . .
>
> 2. The atmosphere thus far in this proceeding has been highly charged leading to an environment that, if continued, makes it difficult at best to keep courtroom decorum and preserve a fair trial. . . .
>
> 3. The nature of the case is such that an early termination of this publicity, without court intervention, appears unlikely. . . .
>
> 4. Although no court proceeding in this matter has yet included *any* evidence either as to the defendant (other than his age) or as to any motive for the killing, there have been numerous public statements as to both."

App. at 7-8.

The trial court made no findings that statements by Ms. Allred posed a substantial likelihood, or even a reasonable likelihood, of materially prejudicing the adjudicatory proceedings. The trial court refused to specify what Ms. Allred could or could not say because it did not want to "give an advisory opinion regarding future communications." App. at 11. Nonetheless, the trial court said that Ms. Allred, as counsel for a potential witness, may not "preview the evidence that might be provided by, or known to, the witness." App. at 11.

Petitioners believed that the Protective Order when read in connection with the Decision is vague and ambiguous as to whether Ms. Allred is prohibited from making comments on certain issues. Accordingly, on November 29,

2005, Petitioners filed a request for clarification of the Protective Order. The trial court denied the request for clarification on December 5, 2005.

On January 11, 2006, Petitioners filed a petition for a writ of mandate or prohibition in the California Court of Appeal for the First District. On January 12, 2006, the Court of Appeal summarily denied the writ petition without explanation. App. at 1.

On January 23, 2006, Petitioners filed a petition for review in the Supreme Court of California. On March 15, 2006, the Supreme Court of California denied review, with Justice Kennard expressing the opinion that the petition should be granted. App. at 2.

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE, WHICH HAS DIVIDED THE FEDERAL AND STATE COURTS, CONCERNING WHETHER AND WHEN GAG ORDERS MAY BE IMPOSED ON ATTORNEYS PREVENTING THEIR SPEECH ABOUT PENDING CASES.

In virtually every high profile case, it is now routine for trial courts to issue broad gag orders preventing attorneys, parties, and witnesses from making public statements. *See* Douglas E. Mirrell, *Gag Orders and Attorney Disciplinary Rules: Why Not Base the Former Upon the Latter*, 17 Loy. L.A. Ent.L.J. 353, 367 (1997) (describing "the increasing frequency with which courts are imposing or threatening to impose gag orders upon

trial participants"); Sheryl A. Bjork, *Indirect Gag Orders and the Doctrine of Prior Restraint*, 44 U. Miami L. Rev. 165, 176 (1989) (describing "a proliferation of orders restraining trial participants").

Such court orders preventing speech are classic prior restraints. *See Alexander v. United States*, 509 U.S. 544, 550 (1993) ("court orders that actually forbid speech activities – are classic examples of prior restraints" because they involve a "true restraint on future speech.") Injunctions are regarded as prior restraints because that is exactly what they are: a prohibition of future expression. As this Court noted, injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764 (1994).

This Court, of course, long has declared that prior restraints on speech constitute "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Injunctions against speech are "the very prototype of the greatest threat to First Amendment values." *Madsen v. Women's Health Center, Inc.*, 512 U.S. at 792-94 (Scalia, J., concurring in judgment in part and dissenting in part). Injunctions are "the product of individual judges rather than of legislatures – and often of judges who have been chagrined by prior disobedience of their orders. The right to free speech should not lightly be placed within the control of a single man or woman." *Id.* at 793.

Prior restraints on attorneys' speech concerning pending cases are particularly troublesome because of the importance of expression about criminal proceedings. As Justice Kennedy explained: "The judicial system, and in

particular our criminal justice courts, play a vital role in a democratic state, and the public has a legitimate interest in their operations. . . . It would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted. . . . Without publicity, all other checks are insufficient; in comparison of publicity, all other checks are of small account." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991) (Kennedy, J., dissenting) (citations omitted).

Although gag orders on lawyers, parties, and witnesses raise profoundly important First Amendment issues, and even though they are increasingly common, this Court never has considered their constitutionality. Nor has the Court ever articulated a legal standard for when, if at all, such prior restraints are permissible. In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), this Court considered gag orders *on the press* and strongly disapproved of such prior restraints except in extraordinary circumstances on a showing that pretrial publicity posed a significant risk to providing a fair trial, that no other alternatives could succeed, and that the gag order was likely to be effective. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), this Court considered when lawyers may be punished *after* speaking and upheld allowing attorneys to be disciplined for speech that presents a substantial likelihood of materially prejudicing an adjudicatory proceeding. Neither *Nebraska Press* nor *Gentile* considered the constitutionality of gag orders placed on attorneys' speech in pending cases. No Supreme Court case ever has considered this.

In the absence of guidance from the Supreme Court, the circuits and the state courts have developed quite

different standards as to whether and when gag orders on the speech of attorneys, parties, and witnesses are permissible. Indeed, three conflicting approaches have emerged, with some circuits and states following each. As a federal district court recently explained: "A three-way circuit split exists with respect to ... the threshold standard for imposing a prior restraint." *United States v. Carmichael*, 326 F.Supp.2d 1267, 1293 (D.Ala. 2004).

First, some courts have held that gag orders on lawyers' speech about pending cases are allowed only if there is a clear and present danger of harm. These courts have essentially articulated a strict scrutiny test, emphasizing the need for a compelling interest and requiring that the gag order be the least restrictive alternative. For example, the Sixth Circuit in *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975), invalidated a gag order imposed on counsel, court personnel, parties, and parties' relatives, friends, and associates. The court explained that the gag order was invalid because it constituted a prior restraint on freedom of speech and there was no showing that it was required to obviate serious and imminent threats to the fairness and integrity of the pending matter. The court said that "[t]he restraint, to meet judicial approval, must pose a clear and present danger, or a serious or imminent threat to a protected competing interest." *Id.* at 238.

Similarly, in *United States v. Ford*, 830 F.2d 596 (6th Cir. 1987), the Sixth Circuit affirmed that gag orders on parties to a lawsuit must meet strict scrutiny. The court explained: "[T]he Supreme Court [has] held that the *Near* [*v. Minnesota*, 283 U.S. 697 (1931)] standard applies to restraints on the press in criminal cases. We see no legitimate reasons for a lower threshold standard for individuals, including defendants, seeking to express themselves

outside of court than for the press." 830 F.2d at 598. The court explained that a gag order must meet "the clear and present danger test." *Id.* at 600. The court stated: "Such a threat must be specific, not general. It must be much more than a possibility or a 'reasonable likelihood' in the future. It must be a 'serious and imminent threat' of a specific nature, the remedy for which can be narrowly tailored in an injunctive order." *Id.*

The Seventh Circuit, too, has said that there must be more than a reasonable likelihood that comments will interfere with a fair trial. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975) (reasonable likelihood standard "does not meet constitutional standards.") The Seventh Circuit, though not using the words "clear and present danger," articulated an approach much like it in concluding that gag orders on lawyers are permissible only if "[there is] a 'serious and imminent threat' of interference with the fair administration of justice." *Id.*

The Ninth Circuit also has used the clear and present danger test and held that gag orders on lawyers and trial participants are permissible only to prevent specific serious and imminent threats of harm. For example, in *Levine v. United States*, 764 F.2d 590 (9th Cir. 1985), the court noted that gag orders on lawyers are prior restraints and "may be upheld only if the government establishes that: (1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected compelling interest, (2) the order is narrowly drawn, and (3) less restrictive alternatives are not available." *Id.* at 595.

A number of states also follow the clear and present danger test used by the Sixth, Seventh, and Ninth

Circuits. In *Kemner v. Monsanto Co.*, 112 Ill.2d 223, 244 (Ill. 1986), the Illinois Supreme Court invalidated a gag order and declared: "[A] trial court can restrain parties and their attorneys from making extrajudicial comments about a pending civil trial only if the record contains sufficient specific findings by the trial court establishing that the parties' and their attorneys' conduct poses a clear and present danger or a serious and imminent threat to the fairness and integrity of the trial. Further, any restraining order which denies parties and counsel their first amendment rights in the interest of a fair trial must be neither vague nor overbroad." *See also Twohig v. Blackmer*, 121 N.M. 746, 749 (1996) (invalidating a gag order on lawyers using the "clear and present danger" test).

In sharp contrast, other circuits and states have taken a second approach, allowing gag orders on lawyers and trial participants so long as there is a "reasonable likelihood of harm," exactly the standard that the Sixth and Seventh Circuits expressly rejected. *United States v. Ford*, 830 F.2d at 598; *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 249 (reasonable likelihood standard is not sufficient to meet the requirements of the First Amendment). The reasonable likelihood standard is far more tolerant of gag orders than the clear and present danger approach.

The Second Circuit, for example, upheld a gag order on lawyers and trial participants and declared: "To decide whether the pretrial publicity justified the order, the standard by which to measure justification is whether there is a 'reasonable likelihood' that pretrial publicity will prejudice a fair trial." *In re Application of Dow Jones & Co.*, 842 F.2d 603, 610 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988). Three Justices dissented from the denial of

certiorari in this case and expressly noted the conflict between the "reasonable likelihood" approach taken by the Second Circuit and the "clear and present danger" test used in other circuits. Justice White, with whom Justices Brennan and Marshall joined in dissenting, stated: "[T]he Second Circuit's adoption of a 'reasonable likelihood' standard conflicts with the Sixth Circuit's 'clear and present danger' standard. Because of the importance of this issue and the conflicting resolutions given it by the courts of appeals, I would grant the petition for certiorari." 488 U.S. at 948.

The conflict has continued and intensified over the last two decades. Several courts have followed the Second Circuit's lead and taken the "reasonable likelihood" approach. For example, the Fourth Circuit has rejected both the clear and present danger test and the "substantial likelihood" test, discussed below, and concluded that "the 'reasonable likelihood' standard is sufficiently narrowly tailored to pass constitutional muster" in allowing gag orders on attorneys' speech about pending cases. *In re Morrissey*, 168 F.3d 134, 140 (4th Cir. 1999).

The Tenth Circuit, too, has adopted the reasonable likelihood standard for when gag orders may be imposed on lawyers and other trial participants. In *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969), the court upheld a gag order on parties and lawyers, and the resulting contempt convictions for violating the prior restraint. The court expressly adopted the "reasonable likelihood" approach and rejected the clear and present danger standard. The court stated: "We believe that reasonable likelihood suffices. The Supreme Court has never said that a clear and present danger to the right of a fair trial must

exist before a trial court can forbid extrajudicial statements about the trial." *Id.* at 666.

A number of state courts have followed the approach used in the Second, Fourth, and Tenth Circuits and have held that gag orders on lawyers and trial participants are permissible so long as there is a "reasonable likelihood" of prejudice to adjudicatory proceedings. *See State v. Bassett*, 128 Wash.2d 612, 616 (1996) ("Under the First Amendment, this means that no restriction is permissible unless the court finds there is at least a 'reasonable likelihood' that pretrial publicity will prejudice a fair trial."); *National Broadcasting Co. v. Cooperman*, 116 A.D.2d 287, 292 (N.Y. App. Div. 1986) ("We are in agreement with the view that extrajudicial statements of attorneys may be subject to prior restraint by a trial court upon a demonstration that such statements present a 'reasonable likelihood' of a serious threat to a defendant's right to a fair trial.")

Yet a third approach has been taken by some courts, a middle position between the clear and present danger standard and the reasonable likelihood test. This approach allows gag orders on lawyers and trial participants if a court finds a "substantial likelihood" that speech could pose a threat to fair adjudicatory proceedings. The substantial likelihood test is obviously more speech protective than the reasonable likelihood approach, but more tolerant of gag orders than the strict scrutiny represented by the clear and present danger test.

The Third Circuit, for example, found a gag order on a former lawyer in a proceeding unconstitutional and concluded that "it is reasonable to apply the 'substantial likelihood of material prejudice' standard announced in *Gentile* to this case." *United States v. Scarfo*, 263 F.3d 80,

94 (3d Cir. 2001). Similarly, the Fifth Circuit approved a "substantial likelihood" test and expressly rejected the clear and present danger test. In *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000), the court upheld a gag order imposed on attorneys, parties, and witnesses. The court noted that "[o]ur sister circuits have not reached a consensus on this question" of when gag orders are constitutionally permissible. *Id.* at 425. After reviewing the varying approaches taken by the different circuits, the Fifth Circuit stated: "In sum, we conclude that in light of *Gentile*, 'clear and present danger' cannot be the appropriate standard by which we evaluate gag orders imposed on trial participants. Instead, the standard must require a lesser showing of potential prejudice." *Id.* at 428. The court concluded: "If the district court determines that there is a 'substantial likelihood' (or perhaps even a 'reasonable likelihood,' a matter we do not reach) that extrajudicial commentary by trial participants will undermine a fair trial, then it may impose a gag order on the participants, as long as the order is also narrowly tailored and the least restrictive means available." *Id.*

Thus, three distinct, conflicting approaches have emerged among the federal circuits. The Sixth, Seventh, and Ninth Circuits allow gag orders on lawyers only if there is a clear and present danger to providing a fair adjudicatory proceeding and essentially require that strict scrutiny be met. The Second, Fourth, and Tenth Circuits allow gag orders if there is a reasonable likelihood of prejudice. The Third and Fifth Circuits allow gag orders if there is a substantial likelihood of materially prejudicing an adjudicatory proceeding. As explained above, state courts are likewise split among these approaches. The uncertainty in the law and the willingness of so many

courts to impose gag orders on lawyers undoubtedly has a chilling effect on speech about the legal system.

In issuing the Protective Order in this case, the Superior Court used the "reasonable likelihood" test. App. at 7. At the very least, it is clear that the order issued by the Superior Court could not survive under either the clear and present danger test or the substantial likelihood approach. There was no finding by the trial court, nor could there be, that Ms. Allred's comments to the press could pose a clear and present danger or a substantial likelihood of causing harm to a fair trial. The trial judge seemed concerned about overall trial publicity. His response was to place a gag on Gloria Allred and others even though there was absolutely no evidence that she had made any improper comments in this case and even though she had never been gagged in the past despite representing many witnesses in high-profile criminal cases.

The only "evidence" that the trial court used to justify the gag order were copies of pages from the Internet of stories regarding the case which the District Attorney submitted to the trial court. At the time of the hearing, the District Attorney filed "Exhibit A" with the court which consisted of numerous pages from the internet containing news reports about the *Dyleski* case. [Ex. 22; App. at 152-245]. However, none of these internet pages contain any quotations from Ms. Allred regarding the facts of the case.

The Superior Court based its Protective Order entirely on the existence of a great deal of publicity surrounding the *Dyleski* trial. But this Court has been clear that publicity alone cannot justify a prior restraint: "[P]retrial publicity, even if pervasive and concentrated, cannot be

regarded as leading automatically and in every kind of criminal case to an unfair trial." *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 565.

Thus, it is highly questionable whether there was sufficient evidence to allow a judge to find a reasonable likelihood that Ms. Allred's comments would harm a fair trial, let alone a substantial likelihood or a clear and present danger. This Court should grant review to offer desperately needed clarification as to whether and when such gag orders are permissible.

This case presents a particularly compelling vehicle to resolve this conflict among the circuit and state courts. First, the attorney in this case, Ms. Allred, was representing a potential witness and not a party. The trial court never explained why Ms. Allred should be treated in the same manner as counsel for the parties. Unlike counsel for the parties, Ms. Allred is not privy to any inside information about the case or its evidence, apart from her client's potential testimony and she already had agreed not to comment on that. She does not have access to pretrial discovery and has not seen the files of either counsel for the prosecution or defense.

Second, the order entered by the trial court in this case is both overbroad and vague. This Court has explained that an injunction "issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968). But the order issued by the trial court in this case is not narrowly tailored. It prohibits Ms. Allred from offering

"any opinion or public comments as to the weight, value or effect of any evidence as tending to establish guilt or innocence." There is no reason why Ms. Allred should not be able to engage in public commentary unrelated to her client's potential testimony, including offering her opinions about other evidence or witnesses. With respect to potential witnesses other than her own client, Ms. Allred is in the same position as any other public commentator and should have the same speech rights.

The overbreadth of the gag order in this case is especially apparent in that according to the District Attorney, petitioners are prohibited from making out of court statements critical of the actions of the prosecution or the police, including the actions of the police that were harmful to their client and her family. [Ex. 27; App. at 261-62]. Petitioners believe that the prosecution has acted in an abusive manner with respect to petitioners' client, a potential witness in the case. Even though the client, through her attorney, voluntarily offered to meet with the prosecution to discuss what she knew, the police showed up at her house the following day in force with guns drawn. The manner in which petitioners' client was mistreated by the prosecution and the police should be open to public discussion and debate. Speech critical of the government misconduct "has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990). But under the District Attorney's reading of the Protective Order, any public statement by petitioners which criticized the actions of government officials and accused them of misconduct with respect to petitioners' client, a potential witness, would be a violation of the Protective Order. [Ex. 27; App. at 262].

There can be no justification for such a sweeping protective order. The District Attorney seeks to use the broad terms of the protective order to stifle Ms. Allred's justifiable criticism of him and the actions of his office. Indeed, the type of speech which the District Attorney seeks to squelch is deserving of the highest constitutional protections. *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. at 1034-35 (citation omitted) (Kennedy, J., dissenting) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment. [The State] seeks to punish the dissemination of information relating to alleged governmental misconduct, which . . . we described as 'speech which has traditionally been recognized as lying at the core of the First Amendment.'"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) ("It would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.")

At the very least, the order is unduly vague in that it is unclear whether and to what extent Ms. Allred may comment on the conduct of the police and prosecutors in this case. The trial court refused to say, indicating that it did not want "to give an advisory opinion regarding future communications." App. at 11. The result is that Ms. Allred cannot know from the order what is permissible and what is forbidden.

CONCLUSION

In high profile trials across the country, it is now common for judges to issue gag orders preventing speech

by attorneys, parties, and witnesses. Because this Court never has addressed the constitutionality of such orders, a significant split of authority has developed among courts across the country as to whether and when there may be such prior restraints on speech. This Court should grant review to resolve this uncertainty and to clarify a crucial aspect of First Amendment law.

Respectfully submitted,

ERWIN CHEMERINSKY
Counsel of Record
DUKE UNIVERSITY
SCHOOL OF LAW
Science Drive & Towerview Rd.
Durham, North Carolina 27708
(919) 613-7173

Attorneys for Petitioners

PAUL HOFFMAN
MICHAEL D. SEPLOW
SCHONBRUN DESIMONE
SEPLOW HARRIS &
HOFFMAN LLP
723 Ocean Front Walk
Venice, California 90201
(310) 396-0731

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 1

GLORIA ALLRED, ET AL.,
Petitioners,
vs.
SUPERIOR COURT COUNTY OF CONTRA COSTA,
Respondent,
THE PEOPLE, ET AL.,
Real Parties in Interest.

A112615
Contra Costa County No. 032191138

BY THE COURT:

The petition for writ of mandate/prohibition and the request for stay are denied. The justices participating in this matter were:

Acting Presiding Justice Stein, Justice Swager and Justice Margulies.

Date: JAN 12 2006 STEIN, J. P.J.

App. 2

Court of Appeal, First Appellate District,
Division One – No. A112615
S140816

IN THE SUPREME COURT OF CALIFORNIA

En Banc

GLORIA ALLRED et al., Petitioners,

v.

SUPERIOR COURT CONTRA
COSTA COUNTY, Respondent;

THE PEOPLE et al., Real Parties in Interest.

(Filed Mar. 15, 2006)

Petition for review DENIED.

Kennard, J., is of the opinion the petition should be granted.

George, C.J., was absent and did not participate.

MORENO
Acting Chief Justice

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

THE PEOPLE OF THE STATE OF CALIFORNIA, No. 3-219113-8

vs. PROTECTIVE ORDER

SCOTT EDGAR DYLESKI,

Defendant. / (Filed Nov. 21, 2005)

IT IS HEREBY ORDERED AS FOLLOWS:

The Office of the District Attorney, those investigating the case on behalf of the People, the Defendant, counsel for the Defendant, those investigating the case on behalf of the Defendant, Judicial Officers and Court staff, Sworn Peace Officers and Public Officials, and those who have been advised that they might be material witnesses in the matter or who have appeared and testified at either a preliminary examination or a grand jury investigating the matter, and all agents, attorneys or other representatives of such witnesses, shall refrain from making any out-of-court statement as to any of the following:

1. The nature, source, substance or effect of any purported evidence alleged to have been accumulated or to exist in regard to this matter.

2. The existence, or possible existence, of any document, exhibit or other physical evidence, the admissibility of which may have to be ruled upon by the court.

3. Any opinion or public comment as to the weight, value or effect of any evidence as tending to establish either guilt or innocence.

4. The identification or possible existence of any other person that might be alleged to have committed or participated in the commission of the subject crime.

5. The identification of any potential witness to the crime, or his or her probable testimony.

Nothing herein shall prohibit any of the following:

1. The defendant, or those acting upon his behalf, from unequivocally asserting his innocence of the crime of which he is accused.

2. Factual statements of an accused person's name, age, residence, occupation, educational status or family identification.

3. The date, time and place of the arrest of an accused.

4. The nature, substance and text of the charge and a description of its parameters.

5. The scheduling and result of any stage of the judicial proceeding held in open court.

6. Any witness discussing any matter in connection with the case with any attorney representing either the People or the Defendant, or investigators on their behalf, or an attorney from whom they might seek legal advice.

Dated: November 21, 2005

/s/ [Illegible]
Judge of the Superior Court

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR
THE COUNTY OF CONTRA COSTA

THE PEOPLE OF THE STATE
OF CALIFORNIA,

vs. No. 3-219113-8

SCOTT EDWARD DYLESKI,

Defendant. /

DECISION GRANTING IN PART AND DENYING IN PART MOTIONS FOR PROTECTIVE ORDER

(Filed Nov. 21, 2005)

The Court having previously taken under submission the above-entitled matter, the Court now issues its decision upon the matter as follows. For the reasons set forth herein, the court will issue a narrowly drawn protective order in this matter.

Firstly, neither the prosecution nor the defense seeks as order that in any way prohibits the public, including the media, from attending all court proceedings in this matter, reporting them as they see fit, or from otherwise including in news or other coverage any reference to facts or opinions that have legally come to their attention. It cannot be seriously denied, however, that virtually all court decisions interpreting the constitutional mandate of freedom of speech and of the press recognize the power of the courts to, under some circumstances, enter protective orders which place limitations upon public commentary by those persons involved in pending litigation matters. See *Sheppard v. Maxwell* (1966) 384 U.S. 333, 359 and *Nebraska Press Assn v. Stuart* (1976) 427 U.S. 539, footnote

27. Indeed, the court has been held to have a *duty* to place such limitations. As was stated in *Farr v. Pitchess* (9th circ. 1976) 522 F.2nd 464:

> "In a criminal case the trial judge has a duty and obligation to attempt to protect the right of the defendants to a fair trial, free of adverse publicity. Where the case is a notorious one, that burden on the court is heavy. The most practical and recommended procedure to insure against dissemination of prejudicial information is the entry of an order directing that attorneys, court personnel, enforcement officers and witnesses refrain from releasing any information which might interfere with the right of the defendant to a fair trial."

When, and under what circumstances, such limitations should be placed has always been a matter of grave concern for the courts. The concern centers upon the possible conflict between the sixth amendment right to a fair trial and the first amendment rights of freedom of speech and of the press. One court referred to this as "the frequently recurring conflict between the media and the judiciary, the two institutions pedestaled in fragile loneliness by the Constitution." *Brian W. v. Superior Court* (1978) 20 Cal. 3rd 618.

It is often the case, as it is in the instant proceedings, that there exists a dispute as to just what burden must be met before a "gag order" of any sort is placed by the court. Some urge that a "clear and present danger" must be established while others urge that a lesser standard can be imposed. In *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, a 5 to 4 majority of the United States Supreme

Court upheld the test of "a substantial likelihood of material prejudice" to be adequate, at least as to orders relating to attorneys.

In *Younger v. Smith* (1973) 30 Cal. App. 3rd 138, 162 the court appears to put this alleged 'difference' in standards of proof aside, commenting that "a reasonable likelihood of an unfair trial is, in itself, a clear and present danger to the administration of justice."

Findings

1. The court finds that this matter has generated an extra-ordinary amount of pretrial publicity; an amount, in fact, that is very rarely seen in the instance of a murder of one individual.

> It is perhaps ironic that in a time when the Internet has become for many a primary news source the internet itself, with its extensive indexing capabilities, allowed the parties seeking a protective order to show the geographic depth of interest in this matter. This search indicates publicity throughout both the state and the country as well as coverage on CourtTV and MSNBC. Such renders the possible remedy of change of venue to be of minor significance.

2. The atmosphere thus far in this proceeding has been highly charged leading to an environment that, if continued, makes it difficult at best to keep courtroom decorum and preserve a fair trial.

> The vast majority of courtroom seats are taken at each hearing with representatives of the media. A reading of the press coverage of the matter, as provided in Exhibit A, shows a general

approach to any news on the matter that virtually presumes that the defendant is guilty of the crime with which he is charged.

3. The nature of the case is such that an early termination of this publicity, without court intervention, appears unlikely.

The matter arose in an unusual and interest-drawing setting. The husband of the victim, Daniel Horowitz, was at the time of the alleged crime himself in the midst of defending a defendant in a "high profile" murder trial. That trial, People v. Susan Polk, had just recently commenced in another department of this court and was closely followed by the press. The defendant in that action has chosen to give numerous interviews to the media, publicly acknowledging that she killed her husband and contending that she did so in self-defense and in response to "years of abuse" by him. That case, too, has generated nationwide media interest, Mr. Horowitz has recently indicated that he will continue with his representation of Mrs. Polk.

4. Although no court proceeding in this matter has yet included *any* evidence either as to the defendant (other than his age) or as to any motive for the killing, there have been numerous public statements as to both.

Newspaper accounts have described the defendant as a teenager who "wore eccentric, dark Goth clothing", was "ambitious", lived a "dark life", was a "non-conformist", wore "a long trench coat" and even was involved in "devil worship". As to motive it has been reported that the defendant was involved in a "credit-card scam" and that he was buying equipment to "grow marijuana".

That such findings justify the issuance of *some* form of protective order or "gag order" cannot be seriously questioned. This conclusion does not, however, determine the issues raised by the motion for, and opposition to, an order. The more important questions are *who* should be covered by any order and what *type* of commentary should be limited or allowed.

The purpose of a protective order in the current environment is to assure a prospective jury panel, for jury selection, that has not been bombarded with either facts or concepts that make it reasonably unlikely that such can be "put aside" and the case determined solely on the trial evidence. When jurors have been inundated with such things they would seem to create prejudgment that even they might be unaware of. Pretrial publicity, for instance, that a defendant was seen at a crime scene may be something that an ordinary juror might be able to put aside when no evidence of such presence is presented at trial, but the subconscious belief that the defendant is guilty, that arose from the pretrial evidence, may lurk indefinitely.

A bar against "discussing the case", as covered by the court's temporary order, is too broad. A statement that one party of the other is "anxious to get to trial", for instance, would be prohibited by the temporary order, even though is [sic] does not include any such factual matters as might lead a potential juror to pre-judge the case.

The volume of publicity that a case can generate would normally appear to be something beyond the control of the court, and that factor alone should never, under current interpretation of constitutional law, justify a "news blackout".

A review of the orders issued in *Hamilton v. Municipal Court* (1969) 270 Cal. App. 2nd 797, and in the *Busch* case that is one of the three cases covered by *Younger v. Smith* (1973) 30 Cal. App. 3rd 138, supra, provides adequate guidelines as to the order that is reasonably necessary in this matter. In substance, where a trial court finds a homicide case in such a level of publicity as the record reflects in this one, fair comment should be allowed but previewing of evidence, much of which might never be before the jury, must be restrained.

To be effective, any order of the court must not only cover the parties and material witnesses involved in the case, but additionally cover those who act as their agents or spokespersons. Any other order would be of little value, allowing one to simply speak through another person uncovered by the order. Thus, from the prosecution side, it is common to include 'investigators' and 'law enforcement' within the restraint. Court personnel must be included both because certain information coming to them may be unavailable to the public under prevailing law and because their statements could be construed as "authoritative" pronouncements.

The position of Gloria Allred, who joins the opposition to the continuance of the current order, is unique. Ms. Allred is apparently employed or invited from time to time to act as a "commentator" on pending legal proceedings. For the reasons set forth above, the court has no intention of issuing an order that would prevent such persons, when not otherwise involved in the pending case, from commenting as he or she sees fit. In the instant case, however, Ms. Allred has indicated that she has been retained to act a [sic] counsel for an unnamed material witness.

The court does not find it necessary to bar any comment from Ms. Allred, nor to give an advisory opinion regarding any future communications. For one thing that may well constitute an unreasonable prior restraint upon free speech. Insofar as she is an attorney for a material witness, however, she will be subject to the same constraints as any other attorney representing a party or witness; she cannot engage in commentary that the witness herself could not engage in. Any party or witness can comment, for instance, on the wisdom of this court issuing the protective order. Ms. Allred is no exception. Neither the witness nor Ms. Allred, however, may preview evidence that might be provided by, or known to, the witness.

Based upon the foregoing, and consistent therewith, the court is issuing, contemporaneously with the filing of this decision, a limited protective order in these proceedings.

Dated: November 21, 2005

/s/ [Illegible]
Judge of the Superior Court